



STATE OF MAINE
PUBLIC UTILITIES COMMISSION

JACK CASHMAN
CHAIRMAN

VENDEAN V. VAFIADES
COMMISSIONER

November 15, 2010

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Petition For Declaratory Ruling of Fairpoint Communications, Inc.

Implementation of Section 224 of the Act
A National Broadband Plan for Our Future

WC Docket No. 07-245
GN Docket 09-51

Dear Ms. Dortch:

On November 3, 2010 FairPoint Communications, Inc., Debtor-in-Possession and its operating subsidiaries (collectively, "FairPoint") filed a Petition for Declaratory Ruling whereby it seeks the intervention of this Commission in an adjudicatory proceeding that was commenced by the Maine Public Utilities Commission (MPUC) on June 30, 2010. The pending MPUC proceeding involves a dispute between FairPoint and a Maine CLEC, the Biddeford Internet Corporation d/b/a/ Great Works Internet ("GWI") regarding access and attachment by GWI to certain of FairPoint's utility poles located in the State of Maine.

Prior to filing its Petition with this Commission, FairPoint had filed with the MPUC a Motion to Dismiss the pending MPUC proceeding. The arguments advanced by FairPoint in support of its motions before the MPUC are largely the same as those which it advances in support of its request that this Commission exercise jurisdiction in this matter.

In an Order issued today, the MPUC denied FairPoint's Motion to Dismiss and for an Expedited Stay. The MPUC found that the pending adjudicatory proceeding before it, concerning the pole attachment dispute, was commenced less than 180 days ago. For the reasons set forth in the MPUC's Order – most notably the fact that 47 USC § 224(c) limits this Commission's authority when a State regulates in the area of pole attachments and that, in any event, pursuant to § 224(c)(3) it may not seek to exercise any authority where, as here, the

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dispute has been pending before a State Commission for less than 180 days – jurisdiction in this matter does not lie with this Commission.

Also on this date, the MPUC's Hearing Examiner issued a Procedural Order establishing a schedule to govern the remainder of the litigation of this proceeding, including evidentiary hearings that will take place in early December, 2010. Copies of the Commission's Order and of the Procedural Order are attached hereto.

For the foregoing reasons, the MPUC requests that FairPoint's Petition Declaratory Ruling be denied. In the event that the Commission does not act summarily in this regard, we respectfully request the opportunity, upon Notice, to more fully respond in opposition to the Petition.

Thank you.

Very truly yours,



Andrew S. Hagler
Director and Staff Attorney
Telephone and Water Utilities Industries

Maine Public Utilities Commission
18 State House Station
Augusta, Maine 04333-0018
(207) 287-3831

Encl.

cc : Service List, MPUC Docket 2010-208 (via e-mail)
John Reel

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2010-206

November 15, 2010

MAINE PUBLIC UTILITIES COMMISSION
Commission Investigation into FairPoint's
Practices and Acts Regarding Access to Utility
Poles Related to Biddeford Internet Corporation

PROCEDURAL ORDER

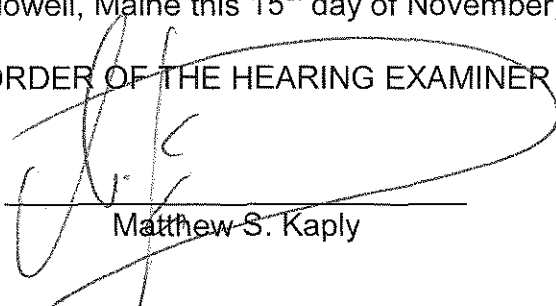
The following schedule is hereby adopted in this proceeding:

Parties file exhibits and objections to testimony	November 19, 2010
Parties supplement exhibit lists and make any objections to exhibits	November 23, 2010
Pre-hearing conference	November 24, 2010 at 10:00 a.m.
Hearings	November 29, 2010 at 9:00 a.m.
Briefs	December 6, 2010
Hearing Examiner's Report	December 13, 2010
Exceptions	December 20, 2010

In addition, the time for the pre-hearing conference was set for **10:00 a.m.** using the following telebridge: **1-916-233-0499, PIN 173464**

Dated at Hallowell, Maine this 15th day of November, 2010.

BY ORDER OF THE HEARING EXAMINER



Matthew S. Kaply

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2010-206

November 15, 2010

MAINE PUBLIC UTILITIES COMMISSION
Commission Investigation into FairPoint's
Practices and Acts Regarding Access to Utility
Poles Related to Biddeford Internet Corporation

ORDER

CASHMAN, Chairman; VAFIADES, LITTELL, Commissioners

I. SUMMARY

In this Order we deny FairPoint's Motion to Dismiss and for an Expedited Stay.

II. BACKGROUND

By way of a letter to the Commission's Director of Telephone and Water Utility Industries, dated February 19, 2010, General Counsel for the Biddeford Internet Corporation d/b/a GWI (GWI) requested that the Director exercise his delegated authority to resolve an apparent disagreement between GWI and Northern New England Telephone Operations LLC d/b/a FairPoint Communications – NNE (FairPoint) regarding certain make-ready work required by FairPoint as a condition of allowing GWI to attach its facilities to poles owned or operated by FairPoint. As outlined in its letter, GWI claims that it submitted applications to FairPoint to attach its facilities to 103 utility poles owned or administered by FairPoint in the area of Bath and West Bath, Maine and that, in response, FairPoint insisted that GWI pay for the cost of raising the existing cable TV lines that are attached to the poles so that space may be made available for the attachment of the new GWI facilities. These costs, GWI claims, could be avoided if only FairPoint would permit it to place its cables along the opposite side of the poles. According to GWI, the unreasonableness of FairPoint's refusal to allow this alternative placement of facilities on its poles (known, in the trade, as "boxing") was established by the Commission in its October 26, 2006 Order issued in *Oxford Networks d/b/a Oxford County Telephone, Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles*, Docket No. 2005-486 ("Oxford Order"). It is also to the Oxford Order that GWI points as the source of the delegation of authority by which the Director may resolve disagreements such as this.

FairPoint objected to GWI's letter and to the preliminary efforts undertaken by the Commission's staff to resolve this disagreement by following the expedited dispute resolution process laid out in the Oxford Order. By way of correspondence dated March 12, 2010, FairPoint's in-house attorney wrote to the Director stating that FairPoint would be deprived due process of law if the Commission attempted to resolve the disagreement in

any manner other than via the formal hearing mechanism and process created by 35-A M.R.S.A. § 711(1) and the pertinent administrative rules. FairPoint also asserted that GWI had failed to fulfill its contractual obligation to engage in a private dispute resolution process to resolve the dispute, and that as a result the Commission would be unable to find, as required by 35-A M.R.S.A. § 711(1)(C), that the two utilities had failed agree to the proposed terms and conditions of a pole attachment. Further, FairPoint argued that permitting GWI to seek relief from the Commission outside of the process set forth in the statute, and before it had fulfilled its obligations to engage in the contractual dispute resolution process, would set an unfortunate precedent "that will bring to the Commission's doorstep more premature litigation from parties seeking to short-circuit the process." In light of these concerns, stated FairPoint, "the appropriate next step is for the parties to meet to discuss possible disputes regarding FairPoint's assessment of make ready work," and for the Commission to "defer consideration of GWI's complaint in order to determine whether it is still necessary to do so after the proper process has been followed."

GWI replied, by letter dated March 30, 2010, asserting, among other things, that it had been unsuccessful in engaging FairPoint in a dispute resolution process that would give due regard for the findings made by the Commission in its Oxford Order. GWI also asserted that, under the Oxford Order, the Director may resolve pole attachment disputes without a hearing subject to appeal rights to the full Commission.

Against this background, on June 30, 2010, the Commission opened an adjudicatory proceeding pursuant to 35-A M.R.S.A §711 and Chapter 880 of its rules, to resolve this dispute between GWI and FairPoint. GWI and FairPoint were made parties to this proceeding, and additional petitions to intervene were subsequently filed by Mid - Maine Communications, OTT Communications, and Cornerstone Communications, LLC.

As directed by the Hearing Examiner, GWI filed its direct testimony on August 10, 2010, and FairPoint filed its direct testimony on September 21, 2010. GWI and FairPoint have also conducted discovery. On October 7, 2010, FairPoint filed a Motion to Dismiss and For Expedited Stay, claiming not that GWI is without a remedy but, rather, that the Commission no longer has jurisdiction to consider and resolve this dispute. According to FairPoint, such jurisdiction reverted, by operation of law, to the Federal Communication Commission (FCC) on August 18, 2010 because, pursuant to 47 U.S.C. § 224(c)(3)(B) and 47 C.F.R. § 1.1414(e), disputes over pole attachments revert to the FCC if a complaint is not resolved within 180 days.

In a written Hearing Examiner's Report, issued on November 3, 2010, Staff recommended that FairPoint's motions be denied. Exceptions to the Hearing Examiner's Report were filed by FairPoint and OTT Communications on November 10, 2010.

III. ANALYSIS AND DECISION

The federal statute that forms the basis of its jurisdictional argument, the Pole Attachment Act (47 U.S.C. § 224), has nothing whatsoever to do with the extent of a

State's authority to regulate the rates, terms, and conditions for pole attachments or to provide for the resolution of disputes regarding such attachments. Rather, in promulgating the Act, Congress conferred upon the FCC authority to regulate pole attachment rates, terms, and conditions, and to adopt procedures necessary and appropriate to hear and resolve complaints regarding the same, but only when and where the State in which the poles are located does not itself provide a mechanism and forum for such regulation and dispute resolution. See 47 U.S.C. § 224(c)(1) ("Nothing in this section shall be construed to apply to, or to give the Commission [FCC] jurisdiction with respect to rates, terms, and conditions, or access to poles...for pole attachments in any case where such matters are regulated by a State") (emphasis added). The Act confers limited authority over pole attachments to the FCC, and it does not purport to preempt or otherwise limit the authority of a State to regulate in this area with respect to the utility poles located within its borders.

Under the Act, the FCC's statutory authority over attachments to poles located in a particular State is triggered when the State does not regulate such matters. Non-regulation by a State is evidenced when a State has not adopted rules and regulations implementing its authority over pole attachments, or where a State has not taken final action on a complaint in a particular matter within a proscribed period after the filing of a complaint (180 days if the implementing rules do not create a different timeframe or within the period set forth in such implementing regulations provided that the period does not exceed 360 days).

Maine does regulate pole attachments. Specifically, pursuant to 35-A M.R.S.A. § 711, the Commission may order the joint use of utility poles and it may prescribe reasonable compensation, terms, and conditions for such joint use following a hearing held either on the Commission's own motion or upon complaint of a public utility. Further, Chapter 880 of the Commission's administrative rules governs the amounts which utilities may include in their cost of service for pole attachments, the allocation of those costs among joint users, and the procedures for establishing cost responsibility and rates.

In addition, Section 14 of Chapter 880 establishes the procedure by which disputes regarding pole attachments may be filed with, and adjudicated by, the Commission. The statutory and administrative scheme for regulating pole attachments in Maine satisfies the federal statutory standard, as set forth in 47 USC § 224 (c), that the FCC must apply when it considers whether or not a State regulates pole attachments. In fact, as recently as May 19, 2010, the FCC acknowledged, by Public Notice, that it considers Maine as among those states which regulate pole attachments. See Docket No. WC 10-101, DA 10-893, Public Notice Released May 19, 2010. In view of the fact this Commission is authorized by state law and regulation to regulate pole attachments and to resolve complaints filed by one utility regarding the pole attachment rates, terms, conditions, or practices of another utility, the FCC's statutory authority over disputes arising out of attachments to poles set in Maine remains, as Congress intended, inchoate.

Even if the FCC could invoke jurisdiction over the subject matter of this particular dispute, it may not do so at this time because 180 days has not passed since the adjudicatory proceedings were commenced at this Commission. Specifically, pursuant to this Commission's administrative rules governing pole attachments disputes and the

adjudicatory process of the Commission in general (the very regulatory scheme upon which the FCC has relied in determining that Maine regulates pole attachments and provides a forum for the resolution of pole attachment disputes), the commencement of an adjudicatory proceeding presumes, at the least, the filing of a complaint with the Administrative Director of the Commission. Chapter 110, § 301. Here, GWI never filed such a complaint. The adjudicatory proceeding that was opened pursuant to 35-A M.R.S.A. § 711 to resolve the GWI/FairPoint pole attachment dispute was initiated *by the Commission on its own motion* as noticed on June 30, 2010. Indeed, the Commission took such action only after FairPoint refused to engage in Staff's earlier attempts to resolve the dispute, as brought to Staff's attention by way of letter addressed to the Director, according to the non-adjudicatory process described in our Oxford Order. FairPoint, having eschewed that informal process, cannot now be heard to rely on GWI's attempt to initiate that same process as providing the starting date for measuring the length of time during which this proceeding has been pending before the Commission.

FairPoint relies on the FCC's administrative rules in support of the proposition that this Commission's jurisdiction over its dispute with GWI "reverted" to the FCC on August 18, 2010. Specifically, 47 C.F.R. § 1.1414(e) provides:

Notwithstanding any such certification, jurisdiction will revert to this Commission [the FCC] with respect to any individual matter, unless the state takes final action on a complaint regarding such matter:

- (1) Within 180 days after the complaint is filed with the state, or
- (2) Within the applicable periods prescribed for such final action in such rules and regulations of the state, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

In light of our finding that the 180 day prerequisite set forth in the federal rule has not been met, it is not necessary that we rule on the Hearing Examiner's rejection of FairPoint's argument in this regard. We agree, however, that FairPoint's reading of the FCC's rule likely goes too far. Indeed, the federal Act, which expressly confers authority to the FCC where a void is left by a State that does not regulate in this area, does not to grant to the FCC exclusive jurisdiction over a pole attachment dispute even in situations it would be permissible under the Act for the FCC to "consider" a State as not regulating pole attachments.

Against this statutory backdrop, we agree that the correct reading of 47 C.F.R. § 1.1414(e) is one that is informed by 47 C.F.R. § 1.1414(d), which describes the process by which the FCC will forward any pole attachment case pending before it to a State that certifies that it regulates pole attachments. Read in this light, the "reversion" language of § 1.1414(e) provides a mechanism for the FCC, after inaction by the relevant State

commission, to resume its consideration of a pole attachment dispute that it had previously forwarded for resolution to a State. Here, as the dispute between FairPoint and GWI was never brought before the FCC, there is nothing to "revert" back to it.

For the foregoing reasons, the Motion to Dismiss and for an Expedited Stay is denied.

Dated at Hallowell, Maine, this 15th day of November, 2010.

BY ORDER OF THE COMMISSION


Karen Geraghty
Administrative Director

COMMISSIONERS VOTING FOR: Cashman
 Littell

COMMISSIONER ABSENT: Vafiades

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within **20** days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.